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Erratum

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Death by a Thousand Cuts: The Illusory Safeguards against Funding Pervasively Sectarian Institutions of Higher Learning

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INTRODUCTION

When the issue of public funding of private schools is discussed, the focus is often on whether—or to what extent—the state is permitted to provide vouchers so that children can attend private elementary or secondary schools. What is too often underappreciated is that there is a separate, more forgiving jurisprudence in the context of aid to higher education, which seems to contradict many of the explications of establishment clause jurisprudence that have been offered by the Court. That the jurisprudence is hard to reconcile has two distinct effects—it makes establishment clause jurisprudence within this area impossible to understand so that there is no coherent guidance for courts confronted with a challenge to the provision of aid in the higher education context, and the Court's analysis in this area bleeds over into other areas, making establishment clause analysis as a general matter even more difficult.

Part I of this Article discusses the trilogy of cases in which the Court addressed direct public funding of religiously affiliated colleges and universities—*Tilton v. Richardson*,¹ *Hunt v. McNair*,² and *Roemer v. Board of*

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1. 403 U.S. 672 (1971).

2. 413 U.S. 734 (1973).

Public Works of Maryland.³ While the analysis in these cases appeared both internally consistent and compatible with the existing jurisprudence, in reality it was neither. Part II discusses some of the more recent cases in lower courts in which state funding of sectarian higher education has been challenged, noting how some of the lower courts claim that the recent Supreme Court jurisprudence vitiates the *Tilton-Hunt-Roemer* analysis. Ironically, given the utter lack of clarity of the *Tilton-Roemer* line of cases, the current treatment in the lower courts might plausibly be viewed as either an application or a repudiation of the established jurisprudence—all that is clear is that the establishment clause limitations on public funding of sectarian colleges and universities, as applied, are so weak that they do virtually no work and may only serve to further dilute establishment clause guarantees more generally.

I. THE AID-TO-HIGHER-EDUCATION TRILOGY OF CASES

Between 1971 and 1976, the Court decided three important cases dealing with aid to religiously affiliated institutions of higher learning—*Tilton v. Richardson*,⁴ *Hunt v. McNair*,⁵ and *Roemer v. Board of Public Works of Maryland*.⁶ The Court offered a test by which to decide whether establishment clause guarantees were violated by state aid to such institutions, in each instance finding that the institutions in question were not pervasively sectarian and that the aid at issue did not violate constitutional guarantees. Yet, the analyses offered by the Court were consistent only in that they yielded the same result—factors thought important in one case were ignored in another and rationales deemed practically dispositive in these cases would have been viewed as irrelevant in other establishment clause contexts. The Court thereby not only offered very little helpful guidance to lower courts but belied its own commitment to apply the relevant criteria and undercut its own credibility in an important area of law.

3. 426 U.S. 736 (1976).

4. 403 U.S. 672 (1971).

5. 413 U.S. 734 (1973).

6. 426 U.S. 736 (1976).

A. *Tilton v. Richardson*

The first important case in the establishment clause aid-to-higher-education context is *Tilton v. Richardson* in which the Court examined a provision of the Higher Education Facilities Act (HEFA) providing funds for the construction of academic facilities at institutions of higher learning.⁷ The HEFA was challenged as a violation of establishment clause guarantees because federal funds were being used for projects at four institutions,⁸ each of which was sponsored by a religious organization.⁹

As an initial matter, the Court addressed whether Congress intended the funds to be available to religious as well as secular institutions. Because Congress had defined the institutions of higher learning that were eligible to receive funds in "broad and inclusive terms,"¹⁰ and because Congress had made clear which institutions it wanted to *exclude*, namely, private, for-profit institutions,¹¹ there was reason to think that religious institutions were also eligible for these government subsidies. Further, sponsors of the bill had said that they intended to include religious institutions as potential recipients,¹² and attempts to exclude such institutions by amendment were defeated.¹³ The Court concluded that Congress had "intended the Act to include all colleges and universities regardless of any affiliation

7. *Tilton*, 403 U.S. at 674-75.

8. *Id.* at 676 ("Federal funds were used for five projects at these four institutions: (1) a library building at Sacred Heart University; (2) a music, drama, and arts building at Annhurst College; (3) a science building at Fairfield University; (4) a library building at Fairfield; and (5) a language laboratory at Albertus Magnus College.").

9. *Id.* ("The sponsorship of these institutions by religious organizations is not disputed.").

10. *Id.* at 676-77.

11. *See id.* at 677 ("Certain institutions, for example, institutions that are neither public nor nonprofit, are expressly excluded.").

12. *See id.* ("Although there was extensive debate on the wisdom and constitutionality of aid to institutions affiliated with religious organizations, Congress clearly included them in the program. The sponsors of the Act so stated . . ." (citing 109 CONG. REC. 19218 (1963) (remarks of Sen. Morse); *id.* at 14954 (remarks of Rep. Powell); *id.* at 14963 (remarks of Rep. Quie))).

13. *See id.* ("[A]mendments aimed at the exclusion of church-related institutions were defeated." (citation omitted)).

with or sponsorship by a religious body.”¹⁴

Once it was established that the HEFA authorized grants to religiously affiliated institutions, the Court then analyzed whether the government’s providing that funding was compatible with establishment clause guarantees. That analysis was in light of the relevant “test,” although the Court cautioned against reading too much into that term,¹⁵ suggesting that the announced standards were simply guidelines in light of which constitutional violations might be identified.¹⁶

Emphasizing that there are no clear, hard-and-fast rules in the area, the Court noted that it could “only dimly perceive the boundaries of permissible government activity in this sensitive area.”¹⁷ The Court then suggested that it would consider the following questions when determining whether the challenged Act passes constitutional muster: “First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?”¹⁸

14. *Id.* at 676.

15. *See id.* at 678 (noting that there are “risks in treating criteria discussed by the Court from time to time as ‘tests’ in any limiting sense of that term”).

16. *See id.* (suggesting that the test should be viewed as providing “guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired”).

17. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

18. *Id.* The *Tilton* Court quickly dispensed with the free exercise claim, stating:

Appellants claim that the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants under the Act. Appellants, however, are unable to identify any coercion directed at the practice or exercise of their religious beliefs Their share of the cost of the grants under the Act is not fundamentally distinguishable from the impact of the tax exemption sustained in *Walz*, or the provision of textbooks upheld in *Allen*.

Tilton, 403 U.S. at 689 (citing *Walz v. Tax Comm’n of the City of N.Y.*, 397 U.S. 664 (1970); *Bd. of Educ. v. Allen*, 392 U.S. 236, 248-49 (1968)). Because the focus here is on the establishment clause and because free exercise discussion does not play a role in any of the subsequent cases, there will be no further discussion of free exercise guarantees.

1. *Is There a Secular Purpose?* The Court dispensed with the first question rather quickly. Congress had said in the preamble of the HEFA that:

“[T]he security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation’s colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education.”¹⁹

The Court concluded that providing the growing numbers of America’s youth with higher education opportunities was a “legitimate secular objective entirely appropriate for governmental action.”²⁰ The Court saw no need to second-guess Congress’s rejection of the proposition that the relevant educational needs could be served by providing funds to public and to private, nonsectarian, non-profit institutions. Rather, the Court accepted that there was a growing need for educational services and that the federal government’s providing funds to aid construction projects at colleges and universities was well-suited to promote that end. After all, the Court noted, the funds were only to be used for “secular educational purposes,”²¹ which suggested that it was not Congress’s purpose to circumvent constitutional limitations by underwriting religious instruction.

2. *Is the Primary Effect of the Act to Advance or Inhibit Religion?* While the Court was confident that Congress’s purposes were legitimate, a separate issue involved whether the effects of the legislation would pass constitutional muster. First, the Court clarified the “Effects” inquiry. To establish that Congress’s providing financial support had a constitutionally impermissible effect, it would not suffice to point out that religious institutions would receive some benefit from the financial

19. *Id.* at 678 (quoting 20 U.S.C. § 701 (1970), *repealed by* Pub. L. No. 92-318, § 161, 86 Stat. 235, 303 (1972)).

20. *Tilton*, 403 U.S. at 679.

21. *Id.* at 674-75.

outlay.²² Rather, the relevant concern was whether the program's "principal or primary effect advances religion."²³

To justify its conclusion that there was no constitutional violation, the Court noted that the act at issue had been drafted carefully to assure that only secular and not religious functions would be subsidized.²⁴ Indeed, the HEFA expressly prohibited the use of funds for "religious instruction, training, or worship."²⁵ While the Court recognized that construction grants would benefit any recipient institution in that the new buildings would help institutions perform various functions,²⁶ the provision of secular aid to religious institutions had previously been upheld by the Court,²⁷ and the Court saw nothing making this kind of aid constitutionally objectionable.

Even a well-crafted statute might have effects which violate constitutional guarantees—the Court recognized that legitimate goals might be undercut by "conscious design or lax enforcement."²⁸ However, the mere possibility that abuses might occur would not justify striking down the legislation.²⁹ Rather, the Court implied, there would have to be some evidence that the legitimate purposes were being undermined before the HEFA could be invalidated as a violation of constitutional guarantees.

The Court offered two reasons to justify its confidence that the HEFA's secular purposes were in fact being served. First, the oversight mechanism incorporated within the Act seemed to be working, because some institutions not before

22. *See id.* at 679 (rejecting the "simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses").

23. *Id.*

24. *Id.*

25. *Id.* at 679-80.

26. *See id.* at 679.

27. *See id.* ("But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld." (citing *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664 (1970))).

28. *Tilton*, 403 U.S. at 679.

29. *See id.* ("[J]udicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional.").

the Court had been forced to return monies which had been used improperly.³⁰ Second, there was no evidence that the institutions before the Court had engaged in prohibited activities. For example, the Court expressly noted that there had been no religious services conducted in the federally financed buildings,³¹ there had been no religious symbols or plaques on the walls,³² and there had been no evidence that the buildings had been used for anything other than nonreligious purposes.³³ The Court concluded that as far as the record was concerned, “these buildings are indistinguishable from a typical state university facility.”³⁴

Of course, the mere fact that there were no religious symbols on the walls and that no religious services had been held in the rooms would not end the inquiry if, for example, the courses incorporated religious instruction. Indeed, the plaintiffs argued that the education at these institutions was pervasively religious³⁵ and that all classes promoted the religious objectives of the schools,³⁶ which meant at the very least that the government’s funding the building of any classrooms would support the schools’ religious mission.

The Court rejected the contention that federal funds were being used to support religious instruction in the schools at issue, noting that two of the five financed buildings were libraries in which no classes had been held.³⁷ Thus, even had it been true that the schools at issue

30. *See id.* at 680 (noting that the “restrictions have been enforced in the Act’s actual administration, and the record shows that some church-related institutions have been required to disgorge benefits for failure to obey them”).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *See id.* at 676 (“[The plaintiffs had] attempted to show that the four recipient institutions were ‘sectarian’ by introducing evidence of their relations with religious authorities, the content of their curricula, and other indicia of their religious character.”).

36. *See id.* at 680 (explaining that the Plaintiffs had argued that “religion so permeates the secular education provided by [these] church-related colleges and universities that their religious and secular educational functions are in fact inseparable”).

37. *Id.* at 681.

were pervasively sectarian, it could not have been claimed that federal funds were being used to support religious instruction if those funds were only used for buildings in which no classes would be held. Of course, there are other ways in which religious instruction might be aided in a library, for example, if the institution imposed severe restrictions on the acquisition of books. However, no evidence was presented establishing or even implying the existence of institutionally imposed restrictions on the books that these libraries could acquire.³⁸

There was no discussion in the *Tilton* opinion about whether an institution that did impose restrictions on library acquisitions would thereby make itself ineligible for federal funding of its library construction. The Court's reticence on this subject was unsurprising, given the lack of evidence of any such restrictions at these schools. What might seem more surprising, however, was that the Court did not consider any other factors when deciding whether the library construction funding violated constitutional guarantees. Suppose, for example, that there had been only religious books in the collection. Even were this limited selection a result of something other than institutional mandate—for example, it was due instead to the choices consistently made by those who had been selected to be in charge of book acquisitions—it nonetheless might suggest that the government's providing funds for a new library would in fact promote the religious mission of the school.³⁹ The point here is not to claim that these institutions in particular would or did in fact limit their holdings to

38. *Id.*

39. *Cf. Steele v. Indus. Dev. Bd. of Metro. Gov't of Nashville & Davidson County*, 117 F. Supp. 2d 693, 729 (M.D. Tenn. 2000), *rev'd*, 301 F.3d 401 (6th Cir. 2002). There, the court stated:

People objecting to the bond issue pointed to the religious collections housed in Lipscomb's library and argued that providing financing for a new library would serve to advance the religious nature of Lipscomb While the court recognizes that a government-funded library may well contain a number of religious books without serving to advance religion in any way, there is a distinction between a library containing a general collection of religious materials as a small part of its collection and a library whose collection contains a substantial number of religious works which are largely dedicated to a particular faith.

Id.

religious books,⁴⁰ but merely that the Court might have engaged in a more searching inquiry before concluding that federal guarantees had not been violated. Lower courts considering analogous cases in the future would look to the Court's analysis for guidance, and the guidance provided suggested that a cursory examination of the local practices was all that was required.

A different issue not even considered by the Court was whether the library might be used in other ways to further religious objectives. For example, libraries might house administrative offices and those offices might be used in ways that promote a school's religious objectives.⁴¹ While there was no suggestion that the school libraries at issue had housed offices promoting religious goals, the Court's having explicitly considered this possibility would have alerted lower courts to the kinds of uses that would be constitutionally precluded, and also would have suggested that the Court was taking its constitutional role seriously.

The other buildings whose construction was at least partially funded by federal monies did have classes in them. One of these buildings was a language laboratory,⁴² which was to be used to help students with their pronunciation of modern foreign languages.⁴³ The Court was confident that this building would not be used in a way which would

40. For example, Fairfield University *currently* seems to have a wealth of non-religious books, judging from their on-line catalog, available at iLink at Fairfield University, <http://sirsi.fairfield.edu/> (last visited Apr. 23, 2008). The same might be said of Sacred Heart University. Ryan-Matura Library, Sacred Heart University, <http://library.sacredheart.edu/> (last visited Apr. 23, 2008). Federal funds were used to help these two schools build their libraries. See *Tilton*, 403 U.S. at 676. A separate question of course is whether the current wealth of selection existed at the time this case was litigated.

41. *Cf. Steele*, 117 F. Supp. 2d at 730:

Some of the bond loan funds also were used by Lipscomb to renovate the old library into administrative offices. Although the evidence does not contain a list of the current occupants of the new administration building, it is reasonable to infer that at least some whose offices are there are involved in the religious mission of the school. A number of the administrative offices have some responsibility for overseeing the daily Bible and chapel requirements and in hiring faculty members who adhere to the religious beliefs of Lipscomb.

42. See *Tilton*, 403 U.S. at 681 ("The third building was a language laboratory at Albertus Magnus College.").

43. *Id.*

violate constitutional guarantees, because its function was "peculiarly unrelated and unadaptable to religious indoctrination."⁴⁴ Yet, the Court offered no reason to support its belief that a modern language laboratory would be immune from abuse. For example, students might be taught to say prayers in modern foreign languages, and this would presumably violate constitutional guarantees. The point here is not that Albertus Magnus College was using its language laboratory to perform religious indoctrination,⁴⁵ but that the Court offered a merely cursory analysis when attempting to determine whether federal funds were being used in ways that violate the establishment clause. The Court's having considered the ways in which a language laboratory might be misused and then having noted that there was no evidence of such misuse by the college both would have made the Court's analysis more persuasive and would have been more helpful to lower courts faced with similar challenges in the future.

The Court's analysis of the constitutionality of the funding of the other two buildings—a science building⁴⁶ and a building for music, drama, and arts⁴⁷—was no less disappointing. The appellants had "introduced several institutional documents that stated certain religious restrictions on what could be taught."⁴⁸ However, the Court noted that there was some evidence showing that "these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination."⁴⁹ After all, the Court noted that each of the institutions subscribed to the "1940 *Statement of Principles on Academic Freedom and Tenure* endorsed by the American Association of University Professors and the Association of American Colleges."⁵⁰

44. *Id.*

45. Albertus Magnus was the college whose language laboratory was being built using federal funds. *See id.*

46. *See id.* ("Federal grants were also used to build a science building at Fairfield University.").

47. *See id.* ("Federal grants were also used to build . . . a music, drama, and arts building at Annhurst College.").

48. *Id.*

49. *Id.*

50. *Id.* at 681-82.

Yet, the Court's citing to the *Statement of Principles on Academic Freedom and Tenure (Principles)* is not particularly reassuring when one considers that the *Principles* include the following:

Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.⁵¹

The *Tilton* Court noted within the opinion that the schools at issue had written policies imposing religious restrictions on what could be taught,⁵² so it would not have violated the *Principles* for a school to have disciplined an individual for expressing disfavored views in the classroom. Discipline might be especially likely to be imposed if the expressed views had been characterized by the institution as "controversial" and having had no relation to the subject of the course.

On first blush, it might seem eminently reasonable to discipline someone for articulating views having no relation to the course subject matter. Why, it might be thought, should there be irrelevant discussions of social issues in a mathematics class? Yet, relevance must be understood in light of the background principle announced by these schools that religion should be incorporated into the courses as a general matter. Thus, religious views would appropriately be included in any class, but anti-religious or other kinds of nonreligious views would not.

Suppose, however, that there had been nothing in the record about the imposition of discipline for "irrelevant," nonreligious discussion in the classroom. Even so, the very possibility that such discipline could be imposed might increase the likelihood that certain, but not other, views would be expressed.⁵³ While schools are, of course, free to

51. 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS 3 (1990) (footnotes omitted).

52. See *Tilton*, 403 U.S. at 681.

53. See *infra* notes 210-12 and accompanying text (discussing the Virginia Supreme Court's view that the lack of enforcement of a restrictive policy might still have a chilling effect unless the decision not to enforce that policy was

encourage views in accord with their religious mission and discourage views contrary to that mission, a separate issue is whether the state should be offering institutions financial support to aid them in pursuing those goals.

The Court in *Lemon v. Kurtzman*⁵⁴ discussed some of the dangers that arise in the context of secondary religious education: "We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education."⁵⁵ The *Lemon* Court was not suggesting that teachers would *consciously* violate their professional obligations and mix the secular with the religious—the Court did not "assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment."⁵⁶ Instead, the Court recognized that a "dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral."⁵⁷ Thus, a teacher even with the best of intentions might find it difficult to "make a total separation between secular teaching and religious doctrine."⁵⁸ Further, it might not be so clear exactly where the relevant line should be drawn, because what might "appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion."⁵⁹ Many of these same points might analogously be made about instructors in religious colleges or universities.

Given the difficulties in ascertaining the line between the secular and the sectarian, even for those who have the best of intentions, the *Tilton* Court's justification for its conclusion that establishment clause guarantees had not been violated by the funding at issue was at best surprising. Even if particular courses were taught according to the "academic requirements intrinsic to the subject matter and

promulgated).

54. 403 U.S. 602 (1971).

55. *Id.* at 617.

56. *Id.* at 618.

57. *Id.*

58. *Id.* at 618-19.

59. *Id.* at 619.

the individual teacher's concept of professional standards,"⁶⁰ the individual teacher's concept of professional standards might not provide a bulwark against religious indoctrination. Indeed, it may well be that an individual teacher's concept of professional standards would correspond to those of the institution, and that both concepts would permit or require the infusion of religious teaching into all aspects of the curriculum.⁶¹

Suppose that federal funds were used to construct a building including classrooms, and that classes in that building included religious instruction. It should not matter for constitutional purposes whether that religious teaching occurred because it was viewed as permissible in light of the teacher's own professional standards or, instead, because the institution believed such instruction in keeping with its mission. In either case, federal funds were being used to promote religious indoctrination.

The *Tilton* Court noted that all four of the schools were "governed by Catholic religious organizations, and the faculties and student bodies at each [were] predominantly Catholic."⁶² However, the Court seemed to think it relevant that "non-Catholics were admitted as students and given faculty appointments."⁶³ Yet, even were it true that there were non-Catholic teachers who were not including religious instruction within their courses, that would hardly speak to whether Catholic teachers were promoting the mission of the school by including religious teaching within their courses. The establishment clause precludes state funding of religious instruction, and there is no waiver of that requirement merely because some teachers choose not

60. *Tilton v. Richardson*, 403 U.S. 672, 681 (1971).

61. Cf. Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859, 1878 (1993) ("A religiously affiliated law school cannot account for itself theologically by being or aspiring to be like law schools maintained by the state or by non-religious private sponsors. It cannot be faithful to itself and also be secular."). See John J. Fitzgerald, Note, *Today's Catholic Law Schools in Theory and Practice: Are We Preserving Our Identity?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 245, 245 (2001) ("[T]he Catholic law schools that train future lawyers have a fundamental responsibility to take up Christ's call so that they may in turn inculcate a sense of Christian mission in their students.").

62. *Tilton*, 403 U.S. at 686.

63. *Id.*

to include religious indoctrination within their courses. *Lemon* had already warned against ignoring "the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular."⁶⁴

Nor can it be claimed that *Lemon* had simply slipped the *Tilton* Court's mind. First, the decisions were argued on the same day,⁶⁵ and issued on the same day.⁶⁶ Second, *Tilton* specifically referred to *Lemon* in several places, differentiating what was at issue in *Tilton* from what was at issue in *Lemon*.⁶⁷

Consider the issue of the potential political divisiveness resulting from the funding of sectarian education. While the *Lemon* Court had noted that "political debate and division, however vigorous or even partisan, are [ordinarily] normal and healthy manifestations of our democratic system of government,"⁶⁸ that same Court had cautioned that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."⁶⁹

If the *Lemon* Court was worried about political divisiveness at the local level that might be caused by funding religious education, one would think that the Court would also have been concerned about potential political divisiveness caused by Congress's appropriating monies on the national level to help fund religious schooling. Yet, the *Tilton* Court dismissed the political divisiveness concern out of hand, simply noting that the appellants had not pointed to "continuing religious aggravation on this

64. *Lemon*, 403 U.S. at 617.

65. *Tilton* was argued on March 2 and 3, 1971, *Tilton*, 403 U.S. at 672; *Lemon* was argued on March 3, 1971, *Lemon*, 403 U.S. at 602.

66. That day was June 28, 1971. See *Tilton*, 403 U.S. at 672; *Lemon*, 403 U.S. at 602.

67. *Tilton*, 403 U.S. at 684-85 ("Our decision today in *Lemon v. Kurtzman* and *Robinson v. DiCenso* has discussed and applied this independent measure of constitutionality [entanglement] under the Religion Clauses."); *id.* at 687 ("In *Lemon* and *DiCenso*, however, the state programs subsidized teachers, either directly or indirectly."); *id.* at 688 ("No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in *Lemon* and *DiCenso*.").

68. *Lemon*, 403 U.S. at 622.

69. *Id.*

matter,”⁷⁰ and hypothesizing that perhaps the “potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely dispersed.”⁷¹

One might have inferred from reading the *Tilton* justification for worrying about political divisiveness on the local but not on the national level that the *Lemon* Court had pointed to evidence of continuing political divisiveness along religious lines and that this divisiveness had been particularly evident in certain localities. Yet, the *Lemon* Court had not pointed to evidence of political divisiveness of any sort, instead merely suggesting that where many pupils attend church-affiliated schools, “it can be assumed that state assistance will entail considerable political activity.”⁷² That activity will likely occur, the Court suggested, because those promoting state support of parochial schools, “understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals.”⁷³ In contrast, those who oppose state support of parochial schools, “whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail.”⁷⁴

Yet, all of the points made by the *Lemon* Court might be made analogously about funding of sectarian schools on the national level. Further, the same points might be made whether the funding of sectarian elementary or secondary schools—or, instead, the funding of sectarian institutions of higher education—was at issue. Colleges and universities would also face rising costs and they, too, would have supporters employing political methods to promote their goals. Individuals who opposed Congress’s supporting religiously affiliated colleges and universities, whether for constitutional, religious, or financial reasons, would also marshal support for their cause. In short, the political

70. *Tilton*, 403 U.S. at 688.

71. *Id.* at 689.

72. *Lemon*, 403 U.S. at 622.

73. *Id.*

74. *Id.*

divisiveness factor is no less persuasively employed on the national level than it is on the local level.

As a way of bolstering its view that establishment clause guarantees were not being violated, the Court explained:

Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis.⁷⁵

Here, one cannot tell whether the Court is seeking to establish that the schools do not promote a particular religion or that the schools do not promote religion generally. That courses cover a range of religious experiences might give one confidence that the theology course would not cover one religion exclusively, although one still might want to know whether one religion was privileged over the others, for example, by the teacher's discussing several religions but then concluding that there was only one true religion.

Even were the course not designed to privilege certain religions over others, a separate question would be whether the course was designed to promote religion generally rather than make it a subject of academic focus. If so, then the establishment clause would still be violated, even if no one religion was promoted at the expense of others. As the Court explained in *Capitol Square Review and Advisory Board v. Pinette*⁷⁶: "The establishment clause does not merely prohibit the State from favoring one religious sect over others. It also proscribes state action supporting the establishment of a number of religions, as well as the official endorsement of religion in preference to nonreligion."⁷⁷ Thus, even were the Court correct that the theology courses at these institutions were not designed to promote

75. *Tilton*, 403 U.S. at 686-87.

76. 515 U.S. 753 (1995).

77. *Id.* at 809 (citing *Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985)).

Catholicism in particular, that would not settle the issue. The question still would be whether the courses were discussing religion on the one hand or promoting religion on the other.⁷⁸ The Court simply refused to address the more difficult issue for establishment clause purposes.

3. *Entanglement.* The *Tilton* Court also considered whether the Act would cause excessive entanglement between church and state. As part of its justification for why it did not, the Court noted that there is "substance to the contention that college students are less impressionable and less susceptible to religious indoctrination,"⁷⁹ reasoning that the "skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations."⁸⁰ Yet, this is an unusual interpretation of both constitutional and congressional objectives and limitations, because it implies that the Constitution's and Congress's focus of concern is to prevent *successful* indoctrination. Were the focus of concern instead that public funds not be used to promote religious teaching or worship, that concern would not be allayed merely because the target audience was hard to persuade. Thus, while it may well be true that college students are not as impressionable as schoolchildren,⁸¹ that point relates to whether the religious teaching will alter the views of the

78. Cf. Leslie Griffin, "We Do Not Preach. We Teach.": *Religion Professors and the First Amendment*, 19 QUINNIPIAC L. REV. 1, 45 (2000) ("Religious studies is not evangelism; one of its defining characteristics is its *secularity*.").

79. *Tilton*, 403 U.S. at 686.

80. *Id.*; see also Richard D. Winders, Casenote, *Building on the Establishment Clause: Government Conduit Financing of Construction Projects at Religiously Affiliated Schools* in *Johnson v. Economic Development Corp.*, 35 CREIGHTON L. REV. 1151, 1171 (2002) ("The Court referred to the less impressionable and more skeptical nature of students of higher education resulting in a greater barrier to religious indoctrination"); F. King Alexander & Clinton W. Alexander, *The Reassertion of Church Doctrine in American Higher Education: The Legal and Fiscal Implications of the Ex Corde Ecclesiae for Catholic Colleges and Universities in the United States*, 29 J.L. & EDUC. 149, 163 (2000) ("The Court also argued that primary and secondary school students were more vulnerable to being indoctrinated into a particular faith because they were younger and less experienced in the ways of the world than the average college-aged student.").

81. But see Julie K. Underwood, *Changing Establishment Analysis Within and Outside the Context of Education*, 33 HOW. L.J. 53, 104 (1990) ("Are children really less susceptible to the inculcation of religion in their first year of college than they are in their last year of high school?").

students rather than to whether the state should be supporting an attempt to indoctrinate religion.

Suppose, for example, that a particular town were to erect a cross on top of city hall.⁸² Would that only be impermissible if doing so was thought likely to change individuals' beliefs? Presumably, this would violate establishment clause guarantees even if no one's religious views were affected and the only result was that certain people seeing the display would then feel like political outsiders.⁸³

The Court contrasted *Lemon* and *Tilton* by suggesting that because "teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction."⁸⁴ However, because "the Government provides facilities that are themselves religiously neutral, . . . [t]he risks of Government aid to religion and the corresponding need for surveillance are therefore reduced."⁸⁵ Yet, this analysis simply will not stand. The Court has suggested that classrooms whose construction was funded in part by the federal government cannot be used to indoctrinate religion. If that is so, then the fact that teachers are not necessarily religiously neutral would speak to the necessity of greater governmental surveillance of those federally funded classrooms, precisely because the teachers might use those classrooms to engage in religious instruction.

The Act specified that "no part of the project may be used for sectarian instruction, religious worship, or the

82. See *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part, dissenting in part) ("I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.").

83. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting). Justice Stevens explained:

It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses. A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith, and a stranger in the political community.

Id.

84. *Tilton*, 403 U.S. at 687-88.

85. *Id.* at 688.

programs of a divinity school,”⁸⁶ and the Court noted that the “restrictions have been enforced in the Act’s actual administration, and the record shows that some church-related institutions have been required to disgorge benefits for failure to obey them.”⁸⁷ Yet, this suggests that the buildings might well be misused, and that oversight might well be required. Precisely because instructors might feel implicit or explicit institutional pressure to include religion within their courses or might feel that they should include such materials either because of their internalized professional standards or, perhaps, their individual consciences, there is a danger that religious indoctrination would take place. Without oversight, that indoctrination might well occur in federally financed buildings. While all else being equal, a reduction in entanglement between church and state is better for all concerned, all else is not equal if the entanglement reduction would increase the likelihood that federal funds would be misused to promote religious indoctrination.

There are at least two distinct ways in which federal funds might be misused: (1) the building whose construction was made possible by federal funds might be used in ways prohibited by statute, or (2) the funds themselves might be misappropriated. Not only was the *Tilton* Court confident that the buildings would be used for their intended purposes, but the Court seemed relatively confident that the funds would be used to help fund the cost of the buildings, noting that another reason that there would be less entanglement required was that “the Government aid here is a one-time, single purpose construction grant.”⁸⁸

Consider two kinds of grants: (1) a one-time grant, and (2) a grant involving partial payments over several years. The Court suggested that there was less need to monitor the former than the latter, perhaps thinking that the one-time grant would immediately be dispensed to those responsible for designing and constructing the buildings at hand.⁸⁹ However, if the one-time allocation was put into an

86. *Id.* at 675.

87. *Id.* at 680.

88. *Id.* at 688.

89. *See id.* (“[T]he Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or

account and the funds were dispensed from that account over several years, then the one-time grant would be functionally equivalent to the grant involving partial payments over several years, at least with respect to the need to monitor those funds to make sure that they were going towards the construction of buildings rather than other expenses not contemplated within the purposes for the provision of the grant.

Where government funds are provided to religious institutions, there are at least two reasons that there might be entanglement: (1) to assure that the funds were in fact going to the designated purpose rather than to some other use, and (2) to assure that the building constructed with federal funds would be used only for the designated purposes. Once the federal funds had been spent, it would no longer be necessary to continue surveillance to assure the fulfillment of the first purpose, but it still would be necessary to continue to monitor to assure that the second purpose would be served.

Justice Douglas explained in his *Tilton* dissent that "surveillance creates an entanglement of government and religion which the First Amendment was designed to avoid."⁹⁰ However, he noted, using federal funds to pay for the construction of buildings at religious institutions would seem to require "surveillance which will last for the useful life of the building."⁹¹ Indeed, the *Tilton* Court implicitly recognized the force of Justice Douglas's point when striking down one provision of the Higher Education Facilities Act.

The Act had provided that if an institution violated the terms of the agreement and used a building whose construction was supported by federal funds for religious services, the government would receive a partial refund.⁹² However, the government was entitled to receive monies back only if the violation occurred within twenty years of

dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities.").

90. *Id.* at 694 (Douglas, J., dissenting in part).

91. *Id.*

92. *Id.* at 682 (majority opinion) ("If a recipient institution violates any of the statutory restrictions on the use of a federally financed facility, § 754(b)(2) permits the Government to recover an amount equal to the proportion of the facility's present value that the federal grant bore to its original cost.").

the completion of the building.⁹³ This meant that a building whose construction was made possible through the use of federal funds could be used for religious worship as long as twenty years had elapsed since its completion.⁹⁴ Because the useful life of the building would probably extend for more than twenty years, the provision would in effect permit the use of government funds to construct buildings to be used for religious purposes—as long as the institution waited the requisite twenty years.⁹⁵ The Court noted: “If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.”⁹⁶ This, the Court held, violated constitutional guarantees.⁹⁷ Yet, if the Court understood that it would be impermissible for the buildings to be used for religious purposes during the life of the building, then it is not clear why Justice Douglas was incorrect in asserting that supervision—and the accompanying entanglement—would also be necessary during those years.

The claim here is not that the schools at issue in *Tilton* used the monies in a way that violated establishment clause guarantees, but that the Court’s justifications for

93. See *id.* at 683 (citing 20 U.S.C. § 754(a) (1970), *repealed* by Pub. L. No. 92-318, § 161, 86 Stat. 235, 303 (1972)), stating that:

This remedy, however, is available to the Government only if the statutory conditions are violated “within twenty years after completion of construction.” This 20-year period is termed by the statute as “the period of Federal interest” and reflects Congress’ finding that after 20 years “the public benefit accruing to the United States” from the use of the federally financed facility “will equal or exceed in value” the amount of the federal grant.

94. *Id.* (“Under § 754(b)(2), therefore, a recipient institution’s obligation not to use the facility for sectarian instruction or religious worship would appear to expire at the end of 20 years.”).

95. The Court stated:

Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body.

Id.

96. *Id.*

97. *Id.* (“To this extent the Act therefore trespasses on the Religion Clauses.”).

why the establishment clause had not been violated sent a signal that the relevant test in the context of higher education was so weak that colleges and universities might be eligible to receive state funding even if those funds would indeed be used to promote religion. The Court did little to undermine that signal in subsequent cases.

B. *Hunt v. McNair*

*Hunt v. McNair*⁹⁸ involved a South Carolina program in which the state created an Educational Facilities Authority (EFA) to assist colleges and universities in financing their construction projects.⁹⁹ The advantage for higher education institutions in making use of the EFA was that the interest on the bonds used to raise money was tax exempt,¹⁰⁰ thereby enabling the school "to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing."¹⁰¹ Basically, the EFA would issue bonds for the desired building improvements, for which the state assumed no direct or indirect obligation.¹⁰² The institution would convey without charge the portion of the campus to be improved to the EFA, and the EFA would lease back that part of the campus to the institution. After the bonds had been paid in full, the EFA would convey the property back to the institution.¹⁰³

98. 413 U.S. 734 (1973).

99. *Id.* at 736 (citing S.C. CODE ANN. § 22-41.4 (1971)).

100. *See id.* at 739.

101. *Id.*

102. *See id.* at 737 ("While revenue bonds to be used in connection with a project are issued by the Authority, the Act is quite explicit that the bonds shall not be obligations of the State, directly or indirectly."); *see also id.* at 738 ("Moreover, since all of the expenses of the Authority must be paid from the revenues of the various projects in which it participates . . . none of the general revenues of South Carolina is used to support a project." (citation omitted)).

103. *See id.* at 738, explaining that:

Under the proposal, the Authority would issue the bonds and make the proceeds available to the College for use in connection with a portion of its campus to be designated a project (the Project) within the meaning of the Act. In return, the College would convey the Project, without cost, to the Authority, which would then lease the property so conveyed back to the College. After payment in full of the bonds, the Project would be reconveyed to the College.

The act creating the EFA included a provision specifying that monies raised by the issuance of these bonds could not be used to construct buildings where there would be sectarian instruction or religious worship.¹⁰⁴ To assure that the property would not be used for sectarian purposes once the institution had regained title to it, the EFA was authorized by the agreement to conduct inspections to assure that the property was not being used improperly.¹⁰⁵

The *Hunt* Court began its analysis by reaffirming that the *Lemon* test would determine whether there had been an establishment clause violation,¹⁰⁶ although the Court characterized the three prongs of that test as “no more than helpful signposts.”¹⁰⁷ The Court quickly dispensed with the purpose prong, observing that the statute’s purpose “is manifestly a secular one.”¹⁰⁸ After all, the “benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation.”¹⁰⁹ Thus, there was no claim that the South Carolina Legislature was secretly trying to aid religious institutions by passing the act in question.

When deciding what the primary effect was, the Court did not consider the primary effect of the statute generally, for example, providing lower cost loans for construction projects to colleges and universities in the state. Rather, to ascertain the primary effect of the statute, the Court would narrow its “focus from the statute as a whole to the only transaction presently before [it].”¹¹⁰

On first blush, it might seem that the Court’s narrowing its focus to the primary effect of the statute with respect to the Baptist College of Charleston¹¹¹ would almost

104. *See id.* at 736-37.

105. *Id.* at 739-40 (“To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.”).

106. *See id.* at 741.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 742.

111. *See id.* at 736.

necessitate a finding that the statute's primary effect would be to promote religion. After all, the monies saved by offering a lower return for tax-exempt bonds would give the college the opportunity to use those monies for other uses more sectarian in nature. Yet, the *Hunt* Court expressly rejected the contention that funding was prohibited if "aid to one aspect of an institution frees it to spend its other resources on religious ends."¹¹² Indeed, the Court offered a rather narrow definition of what would constitute the primary effect of advancing religion—"[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."¹¹³ Thus, aid will have the primary effect of advancing religion only when it is actually used to promote religion either because the aid is specifically used to fund a sectarian program or because it goes to an institution that is so pervasively religious that the aid to that institution cannot help but promote religion.

The Court considered whether the institution before it was "pervasively sectarian,"¹¹⁴ noting that no evidence had been presented that would justify so categorizing that institution.¹¹⁵ The Court noted that the members of the Board of Trustees were elected by the South Carolina Baptist Convention, that the approval of the Convention was required for certain financial transactions,¹¹⁶ and that the college's charter might only be amended by the Convention.¹¹⁷ However, there were no religious qualifications for faculty membership or student admission.¹¹⁸ The Court concluded that on the record there was "no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education,"¹¹⁹

112. *Id.* at 743.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *See id.* at 743-44.

119. *Id.* at 744.

although that may have been because there was relatively little in the record.¹²⁰ Nonetheless, because the institution had not itself been found to be pervasively sectarian and because the statute expressly excluded “any buildings or facilities used for religious purposes,”¹²¹ the Court rejected that the statute would be providing aid to religious rather than secular college activities.¹²² The Court compared the record before it to the record before the *Tilton* Court, noting that there was “no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton*.”¹²³ Thus, given the deferential stance adopted in *Tilton* combined with the scant record before the *Hunt* Court, the Court did not have enough evidence to support the contention that the Baptist College of Charleston was pervasively sectarian.

The entanglement issue implicated in *Hunt* differed from that in *Tilton* because, in *Hunt*, the South Carolina EFA was empowered to:

determine the location and character of any project financed under the act; to construct, maintain, manage, operate, lease as lessor or lessee, and regulate the same; to enter into contracts for the management and operation of such project; to establish rules and regulations for the use of the project or any portion thereof; and to fix and revise from time to time rates, rents, fees, and charges for the use of a project and for the services furnished or to be furnished by a project or any portion thereof. In other words, the College turns over to the State Authority control of substantial parts of the fiscal operation of the school—its very life’s blood.¹²⁴

Thus, the EFA in *Hunt* might become “deeply involved in the day-to-day financial and policy decisions of the College”¹²⁵ in a way that was not even potentially implicated in *Tilton*. However, the *Hunt* Court rejected that there was “a realistic likelihood that [the EFA’s powers]

120. *See id.* at 743.

121. *Id.* at 744.

122. *Id.*

123. *Id.* at 746.

124. *Id.* at 751 (Brennan, J., dissenting).

125. *Id.* at 747 (majority opinion).

would be exercised in their full detail,"¹²⁶ instead accepting that the EFA would only step in if "the College fails to make the prescribed rental payments or otherwise defaults in its obligations."¹²⁷

There were two different respects in which the EFA might be thought to be too deeply entangled in the affairs of the college—one involved the day-to-day financial decisions and the other involved decisions about the inclusion of religious materials in particular.¹²⁸ Justice Brennan argued in his dissent that the "content of courses taught in facilities financed under the agreement must be closely monitored by the State Authority in discharge of its duty to ensure that the facilities are not being used for sectarian instruction."¹²⁹ However, the Court reasoned that the required entanglement in *Hunt* would be no more burdensome than the required entanglement in *Tilton*, and that, therefore, the statute could not be struck down on these grounds.¹³⁰

Almost as an afterthought, the *Hunt* Court implied that the fact that the state was not contributing any monies directly to the school militated in favor of the constitutionality of the program.¹³¹ However, that factor seemed to play no role in the analysis, and so it seems likely that the same result would have been reached even had the monies been loaned or given directly to the school.¹³²

126. *Id.*

127. *Id.* at 748.

128. *See id.* at 745-46 ("Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious purposes and by participating in the management decisions of the College.").

129. *Id.* at 752 (Brennan, J., dissenting).

130. *Id.* at 746 (majority opinion) ("A majority of the Court in *Tilton*, then, concluded that on the facts of that case inspection as to use did not threaten excessive entanglement. As we have indicated above, there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton*.").

131. *See id.* at 738 ("Moreover, since all of the expenses of the Authority must be paid from the revenues of the various projects in which it participates . . . none of the general revenues of South Carolina is used to support a project." (citation omitted)).

132. *See id.* at 754 (Brennan, J., dissenting) ("Nor is the South Carolina arrangement between the State and this College any less offensive to the

Further, the Court's having mentioned this and nonetheless having analyzed whether the funds would be used for sectarian purposes undercuts the claim that the state's not contributing public monies to the school should play an important role in the analysis of whether such bond programs comport with constitutional requirements.¹³³

The Court's mere mention of the fact that the state had not directly given or loaned money to the school should be contrasted with the role that this factor played in the South Carolina Supreme Court decision in which the constitutionality of the statute was upheld.¹³⁴ When that court first heard the case, the court was considering a challenge to the statute that was based on the supposition that public funds were being used to benefit the school.¹³⁵ However, the South Carolina Supreme Court noted that no public monies were involved¹³⁶ and, further, that the state's credit could never be adversely affected.¹³⁷ In this opinion, the South Carolina Supreme Court disposed of the establishment clause objection in one paragraph,¹³⁸

Constitution because it involves, as the Court asserts, no direct financial support to the College by the State."); *see also* *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 764 (1976) ("[T]he form-of-aid distinctions of *Tilton* are thus of questionable importance . . .").

133. *But see infra* notes 265-81 and accompanying text (discussing decisions by different courts in which this factor is deemed important if not dispositive).

134. *See* *Hunt v. McNair*, 177 S.E.2d 362 (S.C. 1970), *vacated*, 403 U.S. 945 (1971).

135. *See id.* at 365, explaining that:

Plaintiff challenges that the Act is invalid on five grounds:

1. The undertaking by the State to finance private educational facilities is not a public purpose for which the State may issue bonds;

2. The Act violates the first sentence of Section 6 of Article X which states "[t]he credit of the State shall not be pledged or loaned for the benefit of any individual, company, association or corporation []."

3. The proposed actions of the Authority would deprive Plaintiff of property without due process of law in violation of the provisions of Section 5 of Article I of the South Carolina Constitution inasmuch as the Authority would expend public funds for the benefit of a private corporation.

(grounds four and five omitted).

136. *Id.* at 368.

137. *See id.*

138. *Id.* at 370.

basically suggesting that because "neither the credit of the State nor the property of the State is involved, it follows that this constitutional provision is not violated."¹³⁹

The United States Supreme Court vacated and remanded the decision for reconsideration in light of *Lemon* and *Tilton*.¹⁴⁰ On remand, the South Carolina Supreme Court reiterated its belief that there was no establishment clause violation because neither the credit nor the property of the state was involved.¹⁴¹ The court distinguished *Lemon*,¹⁴² including an analysis downplaying the State's oversight role:

The surveillance on the part of the State, obviously abhorred by the Court, is not necessary under the proposed financing plan of the college. The Court contemplates execution of a contract which definitely establishes the rights of all parties to the agreement. The State plays a passive and very limited role in the implementation of the Act, serving principally as a mere conduit through which institutions may borrow funds for the purposes of the Act on a tax-free basis.¹⁴³

Yet, there are numerous respects in which it is inaccurate to describe the state as a mere conduit. First, it is not as if individuals were merely using the state as a conduit as they would by sending checks through the mail.¹⁴⁴ Rather, the state was making it possible for the

139. *Id.*

140. See *Hunt v. McNair*, 403 U.S. 945, 945 (1971) (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Earley v. DiCenso*; *Robinson v. DiCenso*; *Tilton v. Richardson*, 403 U.S. 672 (1971)). *Earley* and *Robinson* were companion cases to *Lemon*. See *Lemon*, 403 U.S. at 602.

141. See *Hunt v. McNair*, 187 S.E.2d 645, 648 (S.C. 1972) ("In our previous opinion . . . we said: 'Having held that neither the credit of the State nor the property of the State is involved, it follows that this constitutional provision [the establishment clause] is not violated. There is no conflict between the preservation of religious freedom and the preservation of higher education under the Educational Facilities Authority Act.'").

142. *Id.* at 649-50.

143. *Id.* at 650-51.

144. The United States Postal Service has been described as a "public-private hybrid," which is "no longer simply a branch of the executive but a federally chartered corporation operating under legislative guidelines." Richard J. Hawkins, Comment, *Dysfunctional Equivalence: The New Approach to Defining "Postal Channels" under the Hague Service Convention*, 55 UCLA L. REV. 205, 228 n.126 (2007). Nonetheless, the point of the comparison remains.

college to market bonds at a much lower interest rate, thereby resulting in substantial savings for the school.¹⁴⁵ More important for purposes here, however, is that while the South Carolina Supreme Court was correct that the Court seemed to abhor some of the difficulties caused by intrusive surveillance, that hardly justifies the state's failing to fulfill its constitutional obligation by not engaging in the surveillance. It should hardly be thought a virtue for a state to fail to oversee whether state support is being used to promote religious indoctrination, and establishment clause jurisprudence is turned on its head if a state's refusal to take an active role in overseeing whether funds are being used properly is what enables the funding to pass muster.

The South Carolina Supreme Court noted that the college would convey "substantially all of the campus to the State of South Carolina,"¹⁴⁶ although a few buildings were excluded from that conveyance including "the Physical Education Building, where facilities which are used for religious worship are located."¹⁴⁷ The state supreme court did not examine whether religious indoctrination was included within the classes. The closest that the court came to examining whether the college was pervasively sectarian or to whether there would be impermissible instruction in the classrooms was to note that there was "less potential for experiencing the substantive evils which the religious clauses were intended to protect than in [*Tilton*]."¹⁴⁸ Part of that conclusion may have rested on the composition of the faculty and student body, which the court had noted in a prior opinion was sixty percent Baptist, mirroring the ratio of Baptists to non-Baptists in that part of the state.¹⁴⁹

It is not surprising that the state supreme court did not include an analysis of the ways that the classes were taught. In that court's view, the establishment clause affords "protection against sponsorship, financial support and active involvement of the government in religious

145. See *supra* notes 100-01 and accompanying text.

146. *Hunt*, 187 S.E.2d at 646.

147. *Id.* at 647.

148. *Id.* at 651.

149. See *Hunt v. McNair*, 177 S.E.2d 362, 369 (1970).

activity.”¹⁵⁰ However, the court implied that those protections were not even triggered, given the state’s “passive and very limited role.”¹⁵¹ Yet, one infers from the *Hunt* Court’s analysis that the state was sufficiently involved in the funding to require an analysis of whether there was religious indoctrination in the classroom.

That the South Carolina Supreme Court did not address whether there was religious instruction in the classroom was understandable, given its view that the funding program did not trigger establishment clause protections. However, the *Hunt* Court made clear that those protections were triggered and thus that establishment clause guarantees would be violated were the funds used to promote religious instruction. At the very least, the United States Supreme Court might have remanded the case to get a more developed record with respect to what was going on in the classroom, although that may not have been viewed as a particularly attractive alternative given that the Court had already remanded the case once before.

Tilton and *Hunt* together suggest that the Court takes a very deferential view with respect to state funding of religious higher education. Absent evidence of pervasive sectarianism, the Court will likely uphold the constitutionality of state funding of religious schools of higher education as long as there has been no showing that the funds are being used to promote religious instruction or worship. Yet, this gives the state great incentive not to engage in much oversight. There will then be no evidence of impermissible indoctrination and the funding can be upheld. Indeed, by noting that the record about how classes were taught was rather spare¹⁵² but nonetheless upholding the funding rather than remanding the case for further

150. *Hunt*, 187 S.E.2d at 648 (citing *Walz v. Tax Comm’n*, 397 U.S. 664 (1970)).

151. *Id.* at 650; see also Trent Collier, Note, *Revenue Bonds and Religious Education: The Constitutionality of Conduit Financing Involving Pervasively Sectarian Institutions*, 100 MICH. L. REV. 1108, 1114 (2002) (arguing that “a government authority does not violate the Establishment Clause by issuing revenue bonds to finance a loan to a pervasively sectarian institution because such aid does not involve public funds, is neutrally available, and entails only a minimal and largely indirect relationship between the government and the pervasively sectarian institution”).

152. See *supra* note 120 and accompanying text.

fact-finding, the *Hunt* Court sent an important message to the states. Basically, the Court implied that it would not insist that the state do much to assure that state funds were not used to promote sectarian activities and that the funding of non-pervasively-sectarian institutions would be upheld, absent evidence that the funds were being used to promote religious indoctrination or worship.

In both *Tilton* and *Hunt*, the Court implied that there was little need for much oversight of post-secondary school practices, presumably because college students were less subject to indoctrination.¹⁵³ However, the Court did not make clear whether the students being less subject to indoctrination somehow immunized the attempts to indoctrinate or, instead, made it less likely that schools would try to indoctrinate, thereby obviating the need to maintain strict supervision over the classes. The Court helped answer that question in *Roemer v. Board of Public Works*.¹⁵⁴

C. *Roemer v. Board of Public Works*

At issue in *Roemer* was a statute authorizing annual grants to private colleges, provided that the funds were not used for sectarian purposes.¹⁵⁵ To assure that the monies were used for their stated purposes, the state employed two safeguards. First, it would simply exclude schools primarily awarding theological or seminary degrees.¹⁵⁶ Second, with respect to those schools still potentially qualifying for a grant, the chief executive officer would have to sign an affidavit stating that the funds would not be used for sectarian purposes and describing the purposes for which the monies would be used.¹⁵⁷ Further, a report would have to be filed by the end of the fiscal year describing how the

153. See *supra* notes 79-80 and accompanying text (discussing the *Tilton* Court's reasoning); see also *supra* notes 123, 148 and accompanying text (discussing why the school at issue in *Hunt* was comparable to the schools at issue in *Tilton* and thus why the act at issue in *Hunt* should be upheld in light of *Tilton*).

154. 426 U.S. 736 (1976).

155. *Id.* at 739.

156. See *id.* at 741-42.

157. *Id.* at 742.

funds had been used.¹⁵⁸ The chief executive officer would then have to certify that report and also file a supporting affidavit stating that the funds had not been used for sectarian purposes.¹⁵⁹

Questions of sectarian use would be resolved on the basis of affidavits, if possible. If that would not resolve this issue, then the school might be subjected to a "quick and non-judgmental" audit, which would take one day at most.¹⁶⁰ The *Roemer* plurality noted that "religious institutions need not be quarantined from public benefits that are neutrally available to all,"¹⁶¹ emphasizing that "[n]eutrality is what is required."¹⁶² Basically, the plurality suggested, as long as the state has a secular purpose and does not promote or undermine religion, the state's funding religious institutions will not violate the establishment clause.¹⁶³ That said, however, facial neutrality and a secular purpose provide no guarantee that state funding will pass constitutional muster.¹⁶⁴ After all, the state is constitutionally precluded from paying for religious education.¹⁶⁵

Yet, *Roemer* suggests that the constitutionally required protections against religious indoctrination at the university level are minimal at best. For example, the Court understood that some of the classes at these institutions began with a prayer¹⁶⁶ and, indeed, that a majority of the classes at one of the institutions began with prayer.¹⁶⁷ However, the Court did not hold that, therefore, these institutions could not receive public funding, reasoning instead that the funding was constitutional because there was no institutional policy of encouraging

158. *Id.*

159. *Id.*

160. *See id.* at 743.

161. *Id.* at 746.

162. *Id.* at 747.

163. *See id.*

164. *Id.* ("[A] secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity.").

165. *Id.*

166. *Id.* at 756.

167. *Id.* (noting that a majority of classes at St. Joseph's began with prayer).

prayer and the decision by an instructor to begin class with a prayer was a matter of academic freedom.¹⁶⁸ The Court thereby suggested that a teacher's beginning her class with prayer in a publicly funded classroom was not constitutionally significant as long as this was not mandated by school policy.¹⁶⁹ In addition, the Court noted that some of the instructors wore clerical garb when teaching, and that some of the classrooms had religious symbols.¹⁷⁰ These very factors were the kinds of factors that the *Tilton* Court implied would militate in favor of a finding of pervasive sectarianism.¹⁷¹ Nonetheless, the *Roemer* Court upheld the district court, finding that the colleges were not pervasively sectarian,¹⁷² at least in part because the curriculum covered a wide spectrum of liberal arts courses¹⁷³ and because religious indoctrination was not a substantial purpose of the schools.¹⁷⁴

The Court accepted the finding below that the secular could be separated from the sectarian,¹⁷⁵ and then was willing to assume that the funds would be used correctly.¹⁷⁶

168. *Id.* (quoting the district court, *Roemer v. Bd. of Pub. Works*, 387 F. Supp. 1282, 1293 (1974)).

169. See Patrick B. Cates, *Faith-Based Prisons and the Establishment Clause: The Constitutionality of Employing Religion as an Engine of Correctional Policy*, 41 WILLAMETTE L. REV. 777, 800 (2005) (noting that "while some classes began with prayer, the school did not officially encourage the practice"); David L. Gregory, *Where to Pray? A Survey Regarding Prayer Rooms in A.B.A. Accredited, Religiously Affiliated Law Schools*, 1993 B.Y.U. L. REV. 1287, 1303 (1993) ("Although finding that theology courses were required as part of the program, and even that some classes were begun with a prayer, these facts did not trigger violations of the Establishment Clause.").

170. *Roemer*, 426 U.S. at 756 (quoting *Roemer*, 387 F. Supp. at 1293).

171. See *supra* notes 31-33 and accompanying text.

172. *Roemer*, 426 U.S. at 755 (quoting *Roemer*, 387 F. Supp. at 1293).

173. *Id.* at 756.

174. *Id.* at 755; see also Klint Alexander, *The Road to Vouchers: The Supreme Court's Compliance and the Crumbling of the Wall of Separation between Church and State in American Education*, 92 KY. L.J. 439, 457 (2004) ("[T]he Court closely scrutinized some of the day-to-day practices occurring on some of the campuses, such as prayer in class, the hanging of religious symbols in classrooms and even the 'wearing of clerical garb' by some of the instructors . . . [but] argued that none of these factors were significant because there was 'no actual college policy' of encouraging these practices.").

175. *Roemer*, 426 U.S. at 759.

176. *Id.* at 760 ("We must assume that the colleges, and the Council, will

The Court did not seem to believe that much monitoring was required, suggesting that "secular activities, for the most part, can be taken at face value."¹⁷⁷ For example, the plurality believed that there was "no danger, or at least only a substantially reduced danger, that an ostensibly secular activity—the study of biology, the learning of a foreign language, an athletic event—will actually be infused with religious content or significance."¹⁷⁸ Yet, it would not be surprising that a biology class might include religious content, for example, by discussing whether or when human embryos had become ensouled.¹⁷⁹ Further, while athletic events might not seem particularly religious, prayers for victory might be recited before or during such events. Indeed, it might be noted that one of the few buildings on the Baptist College of Charleston campus that was not eligible for state funding was the physical education building, which also housed the chapel.¹⁸⁰

The *Roemer* plurality did not believe that the fact that the subsidy would be annual rather than a one-time contribution should be dispositive, even though that had played an important role in *Tilton*.¹⁸¹ Nor did the Court

exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate.").

177. *Id.* at 762.

178. *Id.*

179. *Cf. Bd. of Ed. v. Allen* 392 U.S. 236, 258 (1968) (Douglas, J., dissenting). Justice Douglas quoted a textbook used in grades seven through twelve, which included the following:

To you an animal usually means a mammal, such as a cat, dog, squirrel, or guinea pig. The new animal or embryo develops inside the body of the mother until birth. The fertilized egg becomes an embryo or developing animal. Many cell divisions take place. In time some cells become muscle cells, others nerve cells or blood cells, and organs such as eyes, stomach, and intestine are formed.

The body of a human being grows in the same way, but it is much more remarkable than that of any animal, for the embryo has a human soul infused into the body by God. Human parents are partners with God in creation. They have very great powers and great responsibilities, for through their cooperation with God souls are born for heaven.

JOHN MARTIN SCOTT, *ADVENTURES IN SCIENCE* 618-19 (1963)

180. *See Hunt v. McNair*, 187 S.E.2d 645, 647 (S.C. 1972).

181. *Roemer*, 426 U.S. at 763 ("We agree with the District Court that 'excessive entanglement' does not necessarily result from the fact that the subsidy is an annual one.").

seem to believe it important that the funds at issue here went directly to the institution. The *Roemer* Court noted that the funds could be used for any non-sectarian purpose, although the Court was particularly unhelpful with respect to what uses would be impermissible.¹⁸² Indeed, rather than give criteria to determine what would count as sectarian, the *Roemer* Court instead deferred to the Council to develop the appropriate safeguards, apparently endorsing some of the requirements imposed by the Council.¹⁸³ For example, the Council precluded the use of state funds “to pay in whole or in part the salary of any person who is engaged in the teaching of religion or theology, who serves as chaplain or director of the campus ministry, or who administers or supervises any program of religious activities.”¹⁸⁴ Yet, this does not seem to preclude paying individuals who start their classes with a prayer, as long as they do not, in addition, teach religion or theology.

Another provision was that state funds could “not be used to pay any portion of the cost of maintenance or repair of any building or facility used for the teaching of religion or theology or for religious worship or for any religious activity.”¹⁸⁵ Yet, it was not clear whether this limitation only referred to those buildings that were primarily used for religious worship such as a building housing a chapel, or any building in which religious worship might take place. One infers that this limitation only meant the former, given that at one institution over half of the classes began with a prayer and thus on the latter interpretation many of the buildings containing classrooms would then be off-limits for state maintenance support. The same point might be made about state support for the payment of utilities¹⁸⁶ or capital

182. *See id.* at 760 (“We have no occasion to elaborate further on what is and is not a ‘specifically religious activity,’ for no particular use of the state funds is set out in this statute.”).

183. *Id.*

184. *Id.* at 761 n.22.

185. *Id.*

186. The Court explained:

If an institution has any building or facility that is used in whole or in part for the teaching of religion or theology or for religious worship or for any religious activity, State funds may not be used to pay utilities bills unless those buildings or facilities are separately metered. If buildings or facilities used for any religious purpose described in the

construction or improvements.¹⁸⁷

Roemer is extremely deferential with respect to what religiously affiliated institutions of higher learning can do without offending the establishment clause.¹⁸⁸ The Court seemed to accept almost wholesale the district court's conclusion that the "religious programs at each school are separable from the secular programs,"¹⁸⁹ notwithstanding that many classes began with a prayer.

The district court reasoned that "prayer in class is as peripheral to the subject of religious permeation of an institution as are the facts that some instructors wear clerical garb and some classrooms have religious symbols."¹⁹⁰ Perhaps that is so with respect to the *institution*. For example, the practices in a particular classroom might not carry over to classes in a different building, especially if the students in the latter classes had no classes in which there were prayers or religious symbols on the walls or instructors in religious garb. Yet, to say that these practices would not be enough to establish *institutional* permeation hardly suggests that these practices would not contribute to or even constitute religious permeation in the very classes in which these

preceding sentence are separately metered, the cost of providing heat, electricity, and water to those buildings or facilities cannot be paid with State funds.

Id.

187. See *id.* ("If State funds are used to construct a new building or facility or to renovate an existing one, the building or facility may not be used for the teaching of religion or theology or for religious worship or for any religious activity at any time in the future.").

188. See Ralph D. Mawdsley, *Access to Tax Exempt Bonds by Religious Higher Education Institutions*, 65 ED. L. REP. 289, 293 (1991), explaining that:

In *Roemer*, the Court refused to find that grants given to a group of church-related schools constituted support for religion, even though the funds were granted annually and could be put to a wide range of uses, and even though the schools had church representatives on their governing boards, employed Roman Catholic chaplains, held Roman Catholic religious exercises, required students to take religion or theology classes taught primarily by Roman Catholic priests, made hiring decisions for faculty in theology positions partly on the basis of religious considerations, and began some classes with prayer.

189. *Roemer v. Bd. of Pub. Works*, 387 F. Supp. 1282, 1290 (D. Md. 1974), *aff'd*, 426 U.S. 736 (1976).

190. *Id.* at 1293.

practices were occurring. Certainly, in a classroom with religious symbols on the walls, it would be unsurprising that the dynamic of the class would be affected as a general matter if the instructor, dressed in religious garb, were to begin the class with a prayer. Further, it would also be unsurprising were there a kind of carryover effect so that classes in which these practices did not occur might nonetheless be affected if many of the students in those classes were also taking classes in which these religious practices frequently occurred.

The district court had noted that there was "convincing evidence that courses at each defendant are taught 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards.'"¹⁹¹ Yet, given the qualifier involving the individual's concept of professional standards, it might well be that some individual instructors felt that they would be failing to live up to their responsibilities were they *not* to include within their classes the appropriate religious perspective. While the district court might have been correct that the plaintiffs had failed to establish that a professor's "beginning a class with prayer in any way diminishes the atmosphere of intellectual freedom which marks these colleges"¹⁹² *as a whole*, it is hard to believe that the same could be said about many of those classes in particular. Presumably, at least one of the purposes or foreseeable effects of starting a class with a prayer is to change that class's atmosphere in a way that the professor believes would be desirable.

At issue is not whether infusing classes with religion should be permissible in a religiously affiliated school but, instead, whether the state would be violating the establishment clause, for example, by effectively paying the instructor's salary. Judge Bryan noted in his district court dissent that the "payment of the grants directly to the colleges [is] unmarked in purpose."¹⁹³ He worried that grants could "go into secular and sectarian areas at the same time."¹⁹⁴ This danger existed not only with respect to

191. *Id.* at 1294 (quoting *Tilton v. Richardson*, 403 U.S. 672, 681 (1971)).

192. *Id.* at 1293.

193. *Id.* at 1298 (Bryan, J., dissenting).

194. *Id.* at 1299.

theology departments—until the Council had changed its regulations¹⁹⁵—but also with respect to classes where an individual instructor's professional judgment required that she infuse her class with religious instruction.

Some of the institutions whose practices were at issue in *Roemer*—College of Notre Dame, Mount Saint Mary's College, Saint Joseph College and Loyola College,¹⁹⁶ had been subject to a similar suit earlier. *Horace Mann League v. Board of Public Works*¹⁹⁷ involved a challenge to state funding of Western Maryland College,¹⁹⁸ Notre Dame College,¹⁹⁹ and St. Joseph College,²⁰⁰ each of whom was found by the Maryland Supreme Court to be sufficiently sectarian that it could not receive state funding.²⁰¹ While it is not surprising that courts over time might reach different conclusions about whether particular institutions were sufficiently sectarian to be precluded from receiving funds, for example, because the jurisprudence or the institutions' practices had evolved in the interim,²⁰² it is somewhat surprising that institutions that had been thought so sectarian that they could not receive aid were subsequently thought sufficiently unlikely to infuse religious doctrine into their secular classes that close surveillance would not be necessary,²⁰³ even when such classes started with a prayer by an instructor dressed in religious garb.²⁰⁴

The trilogy of aid-to-religious-higher-education cases makes a mockery of establishment clause jurisprudence. Factors that had been thought to be relevant, for example, whether teachers were in fact incorporating religious teaching

195. See *id.* (noting that "the funds *could* be devoted to the compensation of theology faculty").

196. *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 744 (1976). Initially, Western Maryland College was also included, but the suit against that college was dismissed after the district court's ruling. See *id.*

197. 220 A.2d 51 (Md. 1966).

198. *Id.* at 53, 68.

199. *Id.* at 53, 70.

200. *Id.* at 53, 71.

201. *Id.* at 69, 73.

202. *Horace Mann* was decided in 1966 and *Roemer* was decided in 1976.

203. See *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 762 (1976).

204. See *supra* note 170 and accompanying text.

into the curriculum, would suddenly not be relevant, allegedly because the students were less vulnerable to indoctrination. Indicia that an institution was pervasively sectarian—for example, whether the school included religious symbols in the classroom or whether classes began with prayers—were suddenly less important or, perhaps, irrelevant as long as these religious practices were not a result of institutional command. Basically, the Court has created a jurisprudence where it may well be impossible to successfully challenge state aid to higher education on establishment clause grounds.²⁰⁵

II. APPLICATION OF THE SUPREME COURT'S JURISPRUDENCE BY LOWER COURTS

Unsurprisingly, the lower courts have had some difficulty in applying the relevant jurisprudence consistently. They have not known which factors would establish that an institution was pervasively sectarian or even whether such a designation would preclude an institution from receiving state funding. Courts have also been unsure whether their analysis should change if, for example, the state is “merely” involved because it has created a system whereby the school reaps a benefit through the issuance of tax-exempt bonds. The Supreme Court’s utter lack of clarity on these issues is regrettable both because it will likely result in relevantly similar cases being treated differently and because it may well mean that establishment clause guarantees will be diluted even further, both in the higher education context in particular and in the context of education more generally.

A. *The Fourth Circuit*

Over the past twenty years, there have been several cases involving aid to religiously affiliated schools that have been decided by the state and federal courts in the Fourth

205. See Edward M. Gaffney, Jr., *Tales of Two Cities: Canon Law and Constitutional Law at the Crossroads*, 25 J.C. & U.L. 801, 810 (1999) (“No successful challenge has yet been mounted under the Establishment provision to any form of financial assistance, federal or state, institutional or student-based, as long as the level of education was at a religious university.”); see also *id.* at 816 (stating that the Court’s jurisprudence does “not add up to anything like an economic disincentive or penalty (denial of student aid) for forging a clearer relationship between Catholics [sic] universities and the Church”).

Circuit. Those cases help illustrate both how confusing the jurisprudence in this area is and how weak the relevant protections have now been interpreted to be.

In *Habel v. Industrial Developmental Authority*, the Virginia Supreme Court addressed whether Lynchburg's issuing up to sixty million dollars worth of Educational Facility Revenue Bonds on behalf of Liberty University violated constitutional guarantees.²⁰⁶ When seeking to determine whether the city's doing so would comport with the establishment clause, the court examined the nature of the university. The court noted:

Liberty is a church-related, accredited, nonprofit, private university. In October 1989, its faculty and student handbooks contained a number of statements setting forth what Liberty required of its faculty and students. Among the requirements were adherence to a detailed and specific religious doctrine and compulsory attendance at six weekly religious services.²⁰⁷

Members of the faculty were subject to further requirements—for example, they “were obligated to conform to Liberty’s doctrinal statements in teaching their courses and in publishing articles in their respective academic fields.”²⁰⁸ There had been testimony that some of the requirements were not enforced by the school.²⁰⁹ However, rather than follow the *Tilton* Court’s lead by concluding that the absence of enforcement vitiated the constitutional import of the existence of such policies, the Virginia court instead suggested that the evidence of non-enforcement had little or no import, given that the non-enforcement was not itself publicized.²¹⁰ Thus, individuals might still feel compelled to comply with the announced rules, because they did not know that these rules would not be enforced.²¹¹

206. *Habel v. Indus. Dev. Auth.*, 400 S.E.2d 516, 517 (Va. 1991).

207. *Id.* at 518.

208. *Id.*

209. *See id.* at 519 (mentioning the “testimony of witnesses that some of these policies were not enforced before October 1989”).

210. *Id.* (“The testimony of witnesses that some of these policies were not enforced before October 1989 has little value because the instances of nonenforcement were not publicized to students or faculty.”).

211. *See supra* note 53 and accompanying text (noting that unenforced policies might nonetheless have chilling effects).

The Virginia Supreme Court concluded that religion was so pervasive at Liberty University that the bond issue would violate establishment clause guarantees.²¹²

In *Columbia Union College v. Clarke*,²¹³ the Fourth Circuit recognized that “direct state funding of the general education courses of a ‘pervasively sectarian’ institution would violate the establishment clause.”²¹⁴ However, the court was not confident that the district court had been correct in finding that Columbia Union College was a pervasively sectarian institution.²¹⁵ For example, the Fourth Circuit examined the district court’s noting of the “mandatory prayer services for resident students.”²¹⁶ While suggesting that a “reasonable fact finder could find the college’s mandatory prayer policy, requiring attendance at religious services of the vast majority of its *resident* students, reveals that Columbia Union is primarily interested in religious indoctrination at the expense of providing a secular education,”²¹⁷ the circuit court suggested that a reasonable fact finder might nonetheless find otherwise. Because a reasonable fact finder might reach either conclusion, the court suggested that the district court had erred when finding that this factor militated in favor of a finding that the institution was pervasively sectarian.²¹⁸

The district court had also considered a college bulletin for the religion department suggesting that Christian principles should characterize every phase of life in a Christian college.²¹⁹ However, the circuit court reasoned that absent evidence of how the traditional or liberal arts courses were taught, “an equally plausible inference is that

212. See *Habel*, 400 S.E.2d at 519.

213. 159 F.3d 151 (4th Cir. 1998).

214. *Id.* at 162-63.

215. See *id.* at 169 (“We remand the case to the district court so that it can have an opportunity to make the requisite full and careful determinations necessary here.”)

216. *Id.* at 164.

217. *Id.*

218. *Id.* at 165 (“Where both reasonable inferences coexist, on the State’s motion for summary judgment a court must credit the inference most favorable to Columbia Union.”).

219. *Id.*

the college predominantly exposes its students to a wide variety of academic disciplines, including religious teachings."²²⁰ Because a school's exposing its students to a wide array of subjects and approaches could hardly be used to establish that the institution was pervasively sectarian, the district court was wrong to infer that the institution was pervasively sectarian on this basis.

The college faculty handbook noted that those teaching had a "peculiar obligation as Christian scholars,"²²¹ and that the faculty had "complete freedom so long as their speech and actions are in harmony with the philosophies and principles of the college."²²² However, unlike the district court, the circuit court interpreted these policies as potentially consistent with the *1940 Statement of Principles on Academic Freedom*, stating that these statements "provide no proof that the college's religious mission impinged too greatly on its academic freedom."²²³ Indeed, the Fourth Circuit expressly pointed to the Supreme Court in *Tilton* and *Roemer* having cited adherence to the *1940 Statement of Principles on Academic Freedom* as "evidence demonstrating that a college permits 'intellectual freedom' despite its religious affiliation."²²⁴

Thirty-six of the forty full-time faculty members at the school were Seventh Day Adventists.²²⁵ However, the circuit court noted, only fifty-seven percent of the Faculty were Adventists when part-time instructors were included in the count.²²⁶ Further, while the college's literature itself stated that the college reserved the right to favor members of the church in hiring decisions, the circuit court was not convinced that the college had exercised that right.²²⁷ Finally, that the college had asked its students "to evaluate their professors based in part on whether a professor

220. *Id.*

221. *Id.* (quoting Columbia Union College's faculty handbook).

222. *Id.* (quoting Columbia Union College's faculty handbook).

223. *Id.*

224. *See id.* (citing *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 756 (1976); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971)).

225. *Id.* at 166. Columbia Union College is affiliated with the Seventh Day Adventist Church. *See id.* at 154.

226. *Id.* at 166.

227. *Id.*

stresses Christian values and philosophy in the classroom” did not convince the circuit court that the college was pervasively sectarian.²²⁸ Nor did the fact that a great majority of the students were affiliated with the Church suffice to establish the sectarian nature of the college.²²⁹ Because of its rejection that any of these factors established the pervasively sectarian nature of the college, the circuit court remanded the case to the district court with instructions to do further fact-finding.²³⁰

In dissent, Chief Judge Wilkinson noted that “the agreed-upon facts provided the district court with more than an adequate basis to reach its decision.”²³¹ He worried that the court’s posture “would require district courts to leave no stone unturned in establishment clause inquiries into whether educational institutions are properly considered pervasively sectarian,”²³² and further that a religiously affiliated institution might have to jettison “many of the beliefs and practices that it holds most dear” in order to receive state funding.²³³

There are different ways in which the Fourth Circuit’s opinion might be understood. Perhaps the court was simply suggesting that the district court was not justified in concluding that the college was pervasively sectarian, given the posture of the case. Thus, it might be thought that if all of the evidence before the district court was viewed in the light most favorable to the college, the pervasively sectarian status of the college could not be established as a matter of law.²³⁴ Arguably, each of the factors could be viewed in a way which did not conclusively establish the pervasively

228. *Id.*

229. *Id.* at 166-67.

230. *Id.* at 169 (“We remand the case to the district court so that it can have an opportunity to make the requisite full and careful determinations necessary here.”).

231. *Id.* (Wilkinson, C.J., dissenting).

232. *Id.*

233. *See id.* at 170.

234. *See id.* at 165 (majority opinion) (“Where both reasonable inferences coexist, on the State’s motion for summary judgment a court must credit the inference most favorable to Columbia Union.”); *id.* at 166 (“[T]he religious references are simply not enough, in number or in nature, to *compel* the inference that Columbia Union’s attempts at religious indoctrination compromise its academic freedom.”).

sectarian nature of the college and, perhaps, even all of the factors considered together would not establish the pervasively sectarian nature of the school when viewed in the required light.

Yet, the remand by the Fourth Circuit might also be understood somewhat differently. For example, it might be thought that the Fourth Circuit was suggesting that the pervasively sectarian status of the college could not plausibly be established in light of all of the evidence adduced by the district court, even if that evidence was not being viewed in the light most favorable to the college. On remand, the district court adopted this latter interpretation of the Fourth Circuit's opinion.²³⁵

On rehearing, the district court noted that the United States Supreme Court had not yet found any college or university to be pervasively sectarian.²³⁶ The district court then reexamined its previous conclusion that there was a mandatory worship policy, this time emphasizing that the policy only applied to students under the age of twenty-three who lived in the residence halls and thus that the policy did not apply to the majority of students.²³⁷ The court decided that "[b]ecause the subject mandatory worship policy reaches only a minority of students, the Court concludes that the Commission has not met the burden of demonstrating that the policy is being implemented at the expense of secular education."²³⁸ Apparently, the court was not confident that there would be any carry-over from the mandatory religious services into some of the classes which the residents took with other students. Nor did the court believe that the institutional decision to have such a requirement for the younger students who were living on-campus might have represented an institutional attempt to influence those students most subject to influence. The school might have thought, for example, that members of this group should be required to attend religious services

235. See *Columbia Union Coll. v. Oliver*, No. CIV.A. MJG-96-183, 2000 WL 33792738, at *13 (D. Md. Aug. 17, 2000) ("Columbia Union College is not pervasively sectarian under the decision in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976).").

236. See *id.* at *6.

237. *Id.* at *6-7.

238. *Id.*

both because they were younger and because they were living on-campus and thus their environment was more subject to institutional control. Certainly, had this cost-benefit analysis been undertaken by the college, that should not have been thought to undercut the religious mission of the school.

The district court considered that successful completion of religion classes was required by the school in order to graduate. However, the Fourth Circuit panel had suggested that it could not tell how those classes were in fact conducted, notwithstanding the Religion Department's statement that "Christian principles should characterize every phase of college life."²³⁹ This made the actual content and instructional method involved in the courses of great constitutional import. But the classes had not been monitored, because the college had objected that viewing them would be too intrusive.²⁴⁰

The decision not to monitor the classes was viewed by the district court as commendable,²⁴¹ even though this meant that there was insufficient evidence to establish that the religion classes were "taught with the primary objective of religious indoctrination."²⁴² But the inability to establish that about the religion classes meant that the fact that religion classes were mandatory could not be used to help establish the pervasively sectarian nature of the institution. The court implicitly commended the state for adopting a "hear no evil, see no evil, say no evil" attitude, which permitted a possibly pervasively sectarian institution to escape that designation and receive state funding.²⁴³

Testimony had been offered to establish that the college

239. *Id.* (quoting a 1996-97 bulletin from Columbia Union College's Religion Department).

240. *Id.* at *7 n.15.

241. *Id.*

242. *Id.* (quoting *Columbia Union Coll. v. Clarke*, 159 F.3d 151, 169, 176 (4th Cir. 1998) (Wilkinson, J., dissenting)).

243. *Cf.* Carolyn A. Kubitschek, *Holding Foster Care Agencies Responsible for Abuse and Neglect*, 32 HUM. RTS. 6, 6 (2005) (discussing difficulties which arise when officials who are responsible for overseeing foster placements adopt an approach of "see no evil, hear no evil, speak no evil, and write no evil in the case file").

did not foster academic freedom.²⁴⁴ However, the court noted that "faculty members '*have complete freedom* so long as their speech and actions are in harmony with the philosophies and principles of the college,'"²⁴⁵ and concluded that the academic freedom was sufficient for purposes of the inquiry in question.²⁴⁶ Yet, to say that the faculty members have complete freedom to speak and write as long as they follow the party line is to do violence to the notion of academic freedom. That said, however, it is not at all clear that the district court rather than the United States Supreme Court deserves to be criticized for offering this "Alice in Wonderland" analysis of academic freedom.²⁴⁷

While recognizing that the college employed religious preferences in hiring²⁴⁸ and recruiting students,²⁴⁹ the district court did not believe that enough of the criteria had been met to establish the pervasively sectarian nature of the college. The court held instead that the college had a "definite and strong, *secondary*, goal to teach with a 'Christian vision,'"²⁵⁰ apparently believing that an institution with such a goal would not be likely to infuse even its Religion courses with religious instruction.

This decision was appealed. The Fourth Circuit held that the college was entitled to receive funds "without resort to examining the college's pervasively sectarian status,"²⁵¹ suggesting that even pervasively sectarian institutions were not constitutionally barred from receiving state funds.

244. *Columbia Union Coll. v. Oliver*, No. CIV.A. MJG-96-183, 2000 WL 33792738, at *8 (D. Md. Aug. 17, 2000).

245. *Id.* at *8 (quoting Columbia Union College's Policy Handbook for Administration and Faculty).

246. *See id.* at *9 ("In the instant context, there is not a denial of academic freedom determinatively characteristic of a pervasively sectarian institution because a college requires its faculty to follow the religious mission of the school.").

247. *Cf. United States v. Winstar Corp.*, 518 U.S. 839, 928-29 (1996) (Rehnquist, C.J., dissenting) ("Such a result has an Alice in Wonderland aspect to it, which suggests the distinction upon which it is based is a fallacious one.").

248. *Oliver*, 2000 WL 33792738 at *11.

249. *Id.* at *12.

250. *Id.* at *13.

251. *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 (4th Cir. 2001).

Perhaps as a way of shielding the opinion from further review, the circuit court also noted with approval the district court's finding that the college was not pervasively sectarian.²⁵² The circuit court compared the practices of Columbia Union College with those of the colleges at issue in *Tilton*, *Hunt*, and *Roemer*, and found that the college's practices did not differ in a constitutionally significant way from the practices that had been upheld.²⁵³

The Fourth Circuit's constitutional analysis was rather surprising. The court decided whether pervasively sectarian institutions could receive state funding, notwithstanding that (1) the issue was not before the court, (2) the United States Supreme Court has not (yet)²⁵⁴ rejected the relevance of a school's being pervasively sectarian,²⁵⁵ and (3) the result in *Columbia Union College v. Oliver* would have been the same whether or not the Constitution permitted pervasively sectarian universities to be treated differently.²⁵⁶ The opinion was all the more surprising because (1) before the Fourth Circuit had remanded this very case for further consideration, it had noted that direct state funding of courses at pervasively sectarian institutions violates federal constitutional guarantees;²⁵⁷ and (2) the prior decision by the Fourth Circuit involving this very case had been appealed, and the United States Supreme Court had denied certiorari rather than take the opportunity to overrule the pervasively sectarian jurisprudence.²⁵⁸ While the refusal to grant certiorari is not

252. *Id.* at 508.

253. *Id.* at 509.

254. See *Columbia Union Coll. v. Clarke*, 527 U.S. 1013 (1999) (Thomas, J., dissenting from denial of writ of certiorari) ("We should take this opportunity to scrap the 'pervasively sectarian' test . . .").

255. See *Oliver*, 254 F.3d at 510 (Motz, J., concurring) ("[U]nless and until the Supreme Court overrules *Roemer v. Bd. of Pub. Works of Md.* . . . I am unwilling to join in a holding finding that the pervasively sectarian analysis adopted there—when interpreting the very statute at issue here—no longer controls") (parallel citations omitted).

256. See *id.* at 510-11 (Motz, J., concurring) ("Such a holding seems particularly unwarranted when application of the pervasively sectarian analysis requires the same result as the (perhaps) premature disavowal of it.").

257. See *Columbia Union Coll. v. Clarke*, 159 F.3d 151, 162-63 (4th Cir. 1998).

258. *Cf. Clarke*, 527 U.S. at 1013 (Thomas, J., dissenting from denial of writ

equivalent to the Court's affirming the jurisprudence,²⁵⁹ such a refusal provides no basis for believing that the jurisprudence has changed in a significant way.

In *Virginia College Building Authority v. Lynn*, the Virginia Supreme Court recognized that Regent University is "pervasively sectarian," but nonetheless held that the state could issue revenue bonds for the benefit of that university except insofar as those bonds would have benefited the Divinity School.²⁶⁰ Basically, the Virginia Supreme Court followed the line of reasoning suggested by the South Carolina Supreme Court in *Hunt*²⁶¹—because the funds were from private investors rather than state coffers, the funding could not be attributed to the state and thus was not an endorsement of religion.²⁶²

The *Lynn* court noted how similar the case before it was to the facts of *Hunt*,²⁶³ although the school in *Hunt*, unlike Regent, had not been found to be pervasively sectarian.²⁶⁴ The *Lynn* court seemed to rely heavily on a footnote in *Hunt* in which the court had explained that because the aid at issue would not advance or inhibit religion, the court would not address whether the revenue financing at issue in *Hunt* would pass muster even had the school been pervasively sectarian.²⁶⁵ Yet, the court's having refused to address an issue relied on by the court below and instead having offered a different analysis cannot plausibly be cited as an endorsement of the position the court quite consciously refused to analyze.

of certiorari) ("We should take this opportunity to scrap the 'pervasively sectarian' test . . .").

259. See *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943, 943 (1998) (Stevens, J., opinion regarding the denial of the petition for a writ of certiorari) ("[T]he denial of a petition for a writ of certiorari is not a ruling on the merits.").

260. *Virginia Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 689 (Va. 2000).

261. See *supra* note 143 and accompanying text.

262. *Lynn*, 538 S.E.2d at 699.

263. *Id.* at 695 (describing *Hunt* as "a case remarkably similar to the case before us").

264. The *Lynn* court noted regarding *Hunt*: "Upon review of the sparse record in that case, the Court observed that there was 'no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education.'" *Id.* at 695 (citing *Hunt v. McNair*, 413 U.S. 734, 744 (1973)).

265. See *id.* at 695-96.

The Virginia Supreme Court noted that the "Establishment clause landscape is ever-changing."²⁶⁶ While that may be true, the court was relying on a footnote in a case decided eighteen years *prior* to *Habel*, the decision in which the Virginia court had denied Liberty University the funding on both state and federal constitutional grounds.²⁶⁷ Further, the Virginia court seemed to pay too little attention to its own holding in *Habel* that the state constitution barred the funding at issue. Even were the United States Supreme Court to hold that the establishment clause does not bar state funding of pervasively sectarian institutions, *which thus far it has not*, a separate question is whether a state constitution could bar such funding. *Locke v. Davey*, a decision issued subsequent to *Lynn*, suggests that such a state constitutional bar may not offend federal constitutional guarantees.²⁶⁸

The establishment clause jurisprudence with respect to the funding of religiously affiliated institutions of higher learning has undergone a shift in the Fourth Circuit. Both state and federal courts have become more willing to say that that state funding of pervasively sectarian institutions does not violate establishment clause guarantees. In *Lynn*, the Virginia Supreme Court emphasized the special nature of the funding at issue, although in *Columbia Union College v. Oliver* the Fourth Circuit did not rely on that basis to conclude that pervasively sectarian institutions of higher learning must also be eligible for state funding. The Fourth Circuit is not alone in suggesting that the aid-to-higher-education jurisprudence now permits pervasively sectarian institutions to benefit from state largesse.

266. *Id.* at 691.

267. See *Habel v. Indus. Dev. Auth.*, 400 S.E.2d 516, 519 (Va. 1991) ("[T]he proposed bond issue would violate the Establishment of Religion Clauses of the United States and Virginia Constitutions.").

268. *Locke v. Davey*, 540 U.S. 712, 725 (2004) (holding that a state constitutional provision prohibiting state support of the pursuit of a devotional degree was constitutional). The *Locke* Court suggested that "The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here." *Id.* at 725.

B. *The Sixth Circuit*

The Sixth Circuit has also been forced to address the conditions under which the state can provide funding for pervasively sectarian institutions. That circuit has also suggested that the Constitution does not preclude the state from helping pervasively sectarian institutions pursue their religious goals.

In *Steele v. Industrial Development Board of Metropolitan Government Nashville*,²⁶⁹ the Sixth Circuit offered an analysis which echoed the Virginia Supreme Court's *Lynn* analysis. At issue was whether David Lipscomb University, a "pervasively sectarian institution,"²⁷⁰ was entitled to benefit from the issuance of tax-exempt bonds.²⁷¹ While noting that "[t]he vitality of the pervasively sectarian test [was] questionable,"²⁷² the Sixth Circuit reasoned that it did not have to decide whether pervasively sectarian institutions can receive state funding as a general matter. Rather, the circuit court held that because the state was merely acting as a "conduit,"²⁷³ the issuance of the bonds comported with First Amendment guarantees.²⁷⁴

Judge Clay noted in his *Steele* dissent:

That no governmental funds actually reach the coffers of the pervasively sectarian educational institution does not alter for one moment the fact that a direct economic benefit accrues to such an institution as a result of the government's active participation in arranging for a low-cost loan that enables the institution to advance its sectarian mission.²⁷⁵

Judge Clay reasoned that the fact that an institution was receiving a direct economic benefit would suffice to establish that the program should be examined in light of

269. 301 F.3d 401 (6th Cir. 2002).

270. *Id.* at 408.

271. *Id.* at 402.

272. *Id.* at 408; *see also* Collier, *supra* note 151, at 1121 ("There is a growing sense among observers of the Court's Establishment Clause jurisprudence that the *Tilton* trilogy's pervasively sectarian analysis may be obsolete.").

273. *Steele*, 301 F.3d at 414.

274. *See id.* at 416.

275. *Id.* at 438 (Clay, J., dissenting).

establishment clause limitations, which would (presumably) mean that a pervasively sectarian institution would not be permitted to receive the funding.²⁷⁶ While Judge Clay's view seems to represent the view thus far articulated by the Court, both the Fourth and Sixth Circuits have suggested that it is constitutionally permissible for the state to help a pervasively sectarian institution provide instruction. That is exactly what the Court implied the establishment clause precludes when the Court emphasized the importance of requiring that state funds only be used for secular education.²⁷⁷

Suppose that the current Supreme Court were to endorse the results in *Steele* and *Lynn*. It would presumably only be a matter of time before the special nature of the funding in those cases would be viewed as not particularly special,²⁷⁸ and direct funding of pervasively sectarian institutions would be viewed as required in certain circumstances. Justice Thomas has already suggested that pervasively sectarian institutions should be eligible for state funding, claiming that "the Constitution requires, at a minimum, *neutrality* not *hostility* toward religion,"²⁷⁹ and that the refusal to fund pervasively sectarian institutions manifests hostility towards religion. It is simply unclear how many members of the Court agree with Justice Thomas on this matter.²⁸⁰

There is yet another way in which the establishment clause jurisprudence on aid to sectarian institutions seems open to slippage. The Court has suggested that the establishment clause may impose fewer restraints on the funding of colleges and universities if only because the increased skepticism of the students makes religious

276. *But see supra* notes 263-67 and accompanying text.

277. *Cf. Tilton v. Richardson*, 403 U.S. 672, 679-80 (1979) ("[The Higher Education Facilities Act] authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship.").

278. *See Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 698 (Va. 2000) (discussing the "unique nature of the governmental aid").

279. *See Columbia Union Coll. v. Clarke*, 527 U.S. 1013, 1014 (1999) (Thomas, J., dissenting).

280. While no one else signed onto Justice Thomas's dissent to the denial of a writ of certiorari in *Columbia Union College v. Clarke*, that may have been for reasons unrelated to the substance of his dissent.

indoctrination more difficult.²⁸¹ However, the Sixth Circuit has applied its view that the establishment clause offers rather weak limitations on public funding of sectarian institutions in a context involving primary and secondary schools rather than colleges and universities. Thus, in *Johnson v. Economic Development Corporation*, the Sixth Circuit examined a program whereby tax-exempt bonds would be used to help finance the construction of buildings at the Academy of the Sacred Heart, a Catholic elementary and secondary school.²⁸² The school presented itself as a "Christ-centered institution within the tradition of the Roman Catholic Church,"²⁸³ although the Sixth Circuit held that the institution was not pervasively sectarian,²⁸⁴ at least in part, because the faculty and student body included non-Christian members.²⁸⁵

That the institution was not held to be pervasively sectarian did not end the matter, because even institutions that are not pervasively sectarian are prohibited from using state funds for religious projects. The circuit court was convinced that the funds would not be used inappropriately "because the Project expressly excluded the school's chapel."²⁸⁶ However, the analysis involving whether the funds would be used to promote religious instruction was less rigorous than might have been desired.

The *Johnson* court was convinced that public funds would not be used to promote religious instruction because a "review of the course descriptions and the subjects covered for each of the courses . . . demonstrates that the Academy does not interject religion into every aspect of its curriculum."²⁸⁷ Yet, a mere review of the course descriptions would likely not reveal how the school's Christ-centered approach was being implemented. Perhaps the school did not incorporate religious instruction within its classes, but the circuit court's cursory examination of some

281. See *Tilton*, 403 U.S. at 686.

282. *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 503 (6th Cir. 2001).

283. *Id.* at 504.

284. *Id.* at 516.

285. *Id.* at 517.

286. *Id.* at 516.

287. *Id.* at 517.

of the relevant materials would hardly establish that, especially given the school's self-presentation as a Christ-centered institution.

The *Johnson* court repeatedly referred to *Roemer* and *Hunt*,²⁸⁸ suggesting at one point that *Hunt* bore a "striking resemblance to the case at bar."²⁸⁹ But the court nowhere mentioned that *Hunt* and *Roemer* involved institutions of higher learning and that the Court has suggested that it is significant for establishment clause purposes if the students are in college rather than in elementary or secondary school.

It may be that the Academy of the Sacred Heart is not pervasively sectarian and does not engage in religious instruction in state-funded classrooms. Further, it may be that the current Court would no longer hold that there is an important difference between providing funding for primary or secondary religiously affiliated institutions and providing funding for religiously affiliated institutions of higher learning. But the Court has not yet repudiated the distinction and has not held that systems involving tax-exempt bonds need not be examined to make sure that they do not promote religious instruction. The *Johnson* court did not seem to appreciate the importance of the above points, although the court may ultimately have captured the view of the current Court on aid to sectarian institutions.

CONCLUSION

The trilogy of cases involving aid to higher education can be read in various ways. Perhaps the Court was wrestling with a very difficult problem—how to draw a line that does not involve the state's promoting religious indoctrination but at the same time permits religiously affiliated institutions to benefit from state funding. Perhaps the Court was confident that some religiously affiliated colleges and universities should be eligible for state funding because they clearly do not engage in religious instruction but the Court had difficulty in formulating a standard that would distinguish those religiously affiliated institutions that were eligible for funding from those that were not.

288. *Id.* at 515-16.

289. *Id.* at 516.

Yet, it may be that the Court was not trying to wrestle with the best way to articulate the relevant standard. Perhaps, instead, the Court was merely paying lip service to the notion that the state should not support religious instruction. It is rather difficult to tell, especially given the Court's seeming reliance on the *Statement of Principles on Academic Freedom*, which itself permits institutions to impose limitations on their faculty as long as the institution's written policies make the institutional expectations clear.

Recently, some courts have upheld the permissibility of providing the benefits from tax-free bonds to pervasively sectarian institutions, reasoning that this type of financing does not violate establishment clause guarantees. It is a mark of the inscrutability if not incoherence of the Court's trilogy of aid-to-higher-education cases that it is simply unclear whether this is a marked departure from the past jurisprudence or, instead, an application of it.²⁹⁰

The Court has never addressed whether revenue bonds are so different from other kinds of financing that what would otherwise be constitutionally impermissible does not offend constitutional guarantees as long as revenue bond financing is used.²⁹¹ However, both the *Hunt* and the

290. Both the *Lynn* and *Steele* courts cited *Hunt*'s refusal to examine whether revenue bonds should be treated differently. *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 409 (6th Cir. 2002); *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 695-96 (Va. 2000). These courts seemed to infer that *Hunt* permitted pervasively sectarian institutions to receive this kind of financing, although recognizing that the *Hunt* Court never expressly stated that. See *Steele*, 301 F.3d at 409, stating:

This passage would seem to indicate that a public body could serve as a conduit to allow a pervasively sectarian institution to receive the benefits of tax free bonds so long as public funds were not expended. Rather than reach such conclusion, however, the Supreme Court instead found that the schools at issue were not, in fact, pervasively sectarian and found it unnecessary to address the precise issue before this Court.

See also *Lynn*, 538 S.E.2d at 695 ("In footnote seven, the Court suggested that even if an institution is pervasively sectarian, the aid in question may be so unique that the provision of the aid does not result in 'the primary effect' of advancing or inhibiting religion.").

291. See *Hunt v. McNair*, 413 U.S. 734, 745 n.7 (1973), where the Court stated that:

The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school

Roemer Courts spent a lot of time analyzing which institutions were pervasively sectarian. It is at the very least surprising that the Court would have done all of this analysis if the cases could have been disposed of easily by noting that the method of financing did not involve the state's contributing public dollars to promote religious instruction and thus establishment clause guarantees either were not implicated or were only implicated in an attenuated way.

Yet, focusing on where the Court directs its attention may not be the most felicitous way to further one's understanding of establishment clause guarantees. As the Fourth Circuit noted in *Columbia Union College v. Oliver*, the Supreme Court has never found a college to be pervasively sectarian.²⁹² Perhaps that is because of the particular colleges that happened to come before the Court. However, some of the colleges at issue in *Roemer* had previously been found by the Maryland Supreme Court to be so sectarian that they could not receive funding, and there was no suggestion in *Roemer* that the schools' practices had changed in the intervening years.

Some courts seem to imply that the Court's never having characterized a school as pervasively sectarian should be understood to mean that this set of institutions

or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." . . . The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." . . . Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellees argue, Brief for Appellees 14, the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz v. Tax Comm'n* . . . where this Court upheld a local property tax exemption which included religious institutions.

Id. (quoting *Clayton v. Kervick*, 56 N.J. 523, 530-31 (1970); *Hunt v. McNair*, 258 S.C. 97, 107 (1972); citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)).

292. See *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 509 (4th Cir. 2001).

trumpeted by the Court as precluded from receiving state funding should be understood to be empty. If that has been the Court's view *sub silentio*, then Justice Thomas's claim that pervasively sectarian institutions should be eligible for state funding does not really represent a shift in view about who is eligible but merely a shift in view on whether the Court should be honest when representing its view of establishment clause guarantees.

Perhaps the Court has been trying to draw a bright line between funding religiously affiliated institutions of higher learning on the one hand and religiously affiliated primary and secondary schools on the other. However, were that the goal, the Court would have been much more helpful had it been honest and announced that rule instead of forcing courts to divine its meaning. Now, courts are not only upholding aid even to pervasively sectarian institutions of higher learning but are also upholding aid to sectarian primary and secondary schools, even without doing the kind of analysis that the Court has suggested must be performed.

Establishment clause jurisprudence is difficult to understand and apply under any circumstances. But the Court has made it all the harder by implying that certain factors are important and then ignoring them. One can only hope that the Court will offer an account of the establishment clause that not only is clear but that does not further weaken the protections the clause offers, although it seems unlikely that any such account will be offered in the foreseeable future.